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No. 84-1313

In the Supreme Court of the United States

OCTOBER TERM, 1984

BURLINGTON NORTHERN RAILROAD COMPANY
Petitioner,

vs.

RONALD K. COSBY, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

In December, 1977, Burlington Northern, Inc. ("Petitioner" or "BN")[1] and St. Louis-San Francisco Railway Company ("Frisco") filed a joint application to merge with the Interstate Commerce Commission ("I.C.C."). Both BN and Frisco were common carriers by railroad and both operated wholly-owned subsidiary motor carriers, which were subject to the jurisdiction of the I.C.C. BN's motor carrier subsidiary was BN Transport ("BNT") and Frisco's wholly-owned motor carrier subsidiary was Frisco Transportation Company ("FTC"). FTC's certificate to operate

1. In the initial I.C.C. proceeding, the applicant was Burlington Northern, Inc. Petitioner advises the Court that some type of reorganization has subsequently occurred which makes it necessary for the petition to be filed by Burlington Northern Railroad Company. Respondents have no knowledge concerning that reorganization. For the purpose of this brief, both companies will be referred to simply as "Petitioner".

as a motor carrier was restricted to service "auxiliary to or supplemental of rail service."[2] The Respondents are individuals who were employees of FTC at the time of the merger. Petitioner also filed a required I.C.C. application to control FTC because if the railroad merger was granted, BN would automatically control FTC and I.C.C. approval was, therefore, necessary. The I.C.C. consolidated the railroad merger application and the application to control FTC and issued an order aproving both transactions by Decision dated March 25, 1980 and served April 17, 1980 (hereinafter "Merger Order"). The Merger Order, styled *Burlington Northern, Inc.—Control and Merger—St. Louis-San Francisco Railway Company and Burlington Northern, Inc.—Control—Frisco Transportation Co., Inc.*, was published at 360 I.C.C. 783.

In the initial I.C.C. proceeding, various officials of Petitioner, Frisco and FTC testified and represented that the employees would not be adversely affected and that any employee adversely affected would receive employee protective benefits.[3] In obvious reliance on those representations, the I.C.C. concluded in its Merger Order that the effect of the merger on FTC would be merely a change in form, not substance.[4] Recognizing that it was required

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2. Historically railroads were not permitted to operate unrestricted motor carrier operations unless a "special circumstance" test was met. That history was announced in *U.S. v. Rock Island Motor Transit Co.*, 340 U.S. 419 (1951). The special circumstance requirement has subsequently been abolished. *See, Applications for Motor Carrier Operating Authority by Railroads and Rail Affiliates*, 132 I.C.C. 978 (1982), *aff'd sub nom. American Trucking Associations, Inc. v. I.C.C.*, 722 F.2d 1243 (5th Cir.), *cert. denied*, 105 S.Ct. 324 (1984).

3. For the purposes of brevity, the representations made were incorporated into the Order of the Court of Appeals for the Eighth Circuit and are found at Petitioner's Appendix A, pp. 8a through 13a.

4. 360 I.C.C. at 959.

by 49 U.S.C. Section 11347 to consider the interests of carrier empolyees involved, the I.C.C. ordered that railroad employees of the merged system and subsidiaries were entitled to the standard level of protection.[5]

Following the merger of the parent railroads, Petitioner ended up with one railroad and two wholly-owned motor carrier subsidiaries, namely FTC and BNT. Petitioner elected to obtain broad unrestricted operating authority for BNT but not for FTC and in pursuing this course for FTC, Petitioner further elected to abandon FTC's operating certificates with the I.C.C. and the State of Missouri. Petitioner ultimately merged FTC into BNT and all but seven of the FTC employees (including Respondents herein) lost their jobs.[6]

Respondents filed a Petition to Reopen with the I.C.C. to acquire the employee protective benefits promised by Petitioner and Frisco and ordered by the I.C.C.[7] The I.C.C. denied the relief requested by Respondents by Decision dated November 21, 1983 and served November 29, 1983.[8] Respondents timely appealed to the United States Court of Appeals for the Eighth Circuit. Petitioner requested leave to intervene on behalf of the I.C.C. and leave was granted. The matter was fully briefed and argued by all parties, including Petitioner herein, and by Order filed August 22, 1984, Honorable Judges Heaney, Fagg and Collinson unanimously ruled in favor of Respondents.[9] In that Order the Eighth Circuit fully considered

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5. 360 I.C.C. at 1182.

6. Merger Order. *See*, Brief for Petitioner, Appendix at 15a.

7. *See*, 49 U.S.C. Section 10327(g)(1) and Rule 49 C.F.R. 1100.98(d).

8. *See*, Brief for Petitioner, Appendix at 15a through 21a.

9. *See*, Brief for Petitioner, Appendix at 1a through 14a.

all arguments presented and held Respondents herein were entitled to receive benefits in accordance with the protective conditions contained in the I.C.C.'s 1980 Order and remanded the case to the I.C.C. for a computation of benefits. At no time did the Petitioner herein, the I.C.C. or the Department of Justice object to the jurisdiction of the Eighth Circuit to rule on the relief sought.

Petitioner timely filed a Petition for Rehearing with the Eighth Circuit and said Petition was denied.[10] Subsequently the I.C.C. reopened the merger proceeding for the purpose of imposing employee protective conditions for Respondents by Decision dated December 21, 1984 and served January 8, 1985.[11]

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10. *See*, Brief for Petitioner, Appendix at 23a.

11. *See*, Brief for Petitioner, Appendix at 24a-25a.

SUMMARY OF THE ARGUMENT

Petitioner claims the Eighth Circuit has departed from the precedent of the I.C.C. and in so doing has exceeded its jurisdiction and usurped the function of the I.C.C. Petitioner also claims the Eighth Circuit ruling has broad industry overtones which warrant review by this Court.

Respondents submit these claims are not well founded. The I.C.C. and the Department of Justice have determined not to seek review of the Eighth Circuit ruling. Respondents believe the I.C.C. has not sought review because it recognizes the ruling was specifically based on the unique facts of this case and that no broad industry-wide implications exist. More specifically, the "auxiliary-to-rail" restriction contained in FTC's operating authority limited FTC's scope of operations to rail-rleated movements. Such restriction probably no longer exists in other rail wholly-owned motor carrier subsidiaries following the enactment of legislation and the adoption of regulations which have subsequently abolished the requirement for railroads to have restricted motor carrier certificates. Furthermore, the Eighth Circuit ruling relied greatly on specific representations and promises made by numerous officials of Petitioner in the I.C.C. proceeding which representations make the facts of this case unique.

The Petitioner raises arguments in its Petition concerning jurisdiction and arbitration. Respondents requested relief from the I.C.C. on January 3, 1983. Petitioner briefed its position before the I.C.C. and the Eighth Circuit and never presented any argument on these points. Therefore, those issues were not preserved and should not be raised for the first time before this Court.

There is no conflict between circuits on the question of employee protection in cases involving employees of a wholly-owned motor carrier subsidiary of a railroad. Therefore, review by this Court is not necessary to resolve such conflict.

The Eighth Circuit ruling is fair and correct. The lower court fully considered the law, Congressional intent and the undisputed facts in reaching its decision. Petitioner has shown no manifest unfairness which would warrant review. Petitioner claims the Court of Appeals exceeded its jurisdiction by structuring a level of benefits for Respondents which it argues should have been left to the discretion of the I.C.C. The Court of Appeals simply found that Respondents were members of the class subject to the benefits previously structured by the I.C.C. in its Merger Order. Thus, the Court of Appeals was well within statutory jurisdiction and authority. Therefore, the Petition for a Writ of Certiorari should be denied.

ARGUMENT IN OPPOSITION TO WRIT OF CERTIORARI

A. Neither the Interstate Commerce Commission nor the Department of Justice Has Requested Review of the Order of the Eighth Circuit.

At the outset it should be noted that the primary petitioners in an appellate proceeding involving the exercise of administrative agency authority would normally be the agency involved and the Department of Justice. In this case, the I.C.C. fully briefed and orally argued the issues before the Eighth Circuit. Neither the I.C.C. nor the Department of Justice filed a Petition for Rehearing with the Eighth Circuit nor have they applied for a Writ of Certiorari with this Honorable Court. Respondents believe this action on behalf of the I.C.C. is based on its recognition that the facts involved in this case are materially different from other proceedings now pending before it and that a review by this Honorable Court is neither warranted nor necessary.

B. The Holding of the Court of Appeals Does Not Have Broad Implications on the Transportation Industry.

Petitioner suggests the Eighth Circuit's holding has broad implications on the transportation industry as a whole. This argument ignores the fact found by both the I.C.C. and the Eighth Circuit that Respondents' former employer, FTC, was limited in its operation to providing auxiliary-to-rail services. This argument further ignores the enactment of the Motor Carrier Act of 1980, PL. 96-258, 94 Stat. 427, and the abolishment of the special circumstances test which historically prevented railroads from obtaining broad unrestricted motor carrier authority.[12]

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12. *See, supra*, note 2.

Thus, virtually any person, including railroads, may now obtain broad unrestricted motor carrier authority from the I.C.C. Respondents seriously doubt that following this so-called "deregulation", any auxiliary-to-rail restrictions remain. Therefore, it is extremely unlikely a case under these facts will arise in the future.

Petitioner argues that unions are urging employee protection in several cases presently pending before the I.C.C. based on this Eighth Circuit ruling.[13] Respondents are familiar with the Decision of the I.C.C. in only one of those cited cases, namely *Chicago, Milwaukee, St. Paul and Pacific Railroad—Reorganization—Acquisition by Grand Truck Corporation*, Finance Docket No. 28640 (Sub-No. 9). In that case the I.C.C. has issued a Decision bearing service date January 11, 1985 in which motor carrier employees were denied employee protective conditions. In that ruling, the I.C.C. distinguished the present Eighth Circuit ruling on the basis of the auxiliary-to-rail limitations found in this case. While Respondents do not wish to argue the merits of that case herein, they believe it is pertinent to point out that the I.C.C. apparently is not construing this Eighth Circuit Order as a precedent to be followed in every case involving railroads with motor carrier subsidiaries. Consequently, Petitioner's claim of broad industry-wide implications appears to be overstated.

Even if the I.C.C. were to view the Eighth Circuit's Order as an industry-wide precedent for granting employee protective conditions to motor carrier subsidiaries of all railroads without limitation, review by this Court would be more appropriate in a future case involving no restrictions.

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13. *See*, Brief for Petitioner at 16, note 29.

C. The Petitioner Requests Review of Matters Not Presented to the Eighth Circuit and Therefore Not Preserved for Review.

The Petitioner argues that the Eighth Circuit exceeded its jurisdiction by determining issues which should have been subject to arbitration and that the Eighth Circuit erred by directing the I.C.C. to grant this particular relief. Neither the Petitioner, the I.C.C. nor the Department of Justice raised these issues before the Eighth Circuit when it granted the specific relief requested by the Respondents herein. Supreme Court Rule 15(g) requires the Petitioner to specify "the stage in the proceedings (both in the Court of first instance and in the appellate court) at which the questions sought to be reviewed were raised; the method or manner of raising them; and the way in which they were passed upon by the Court." A review of the Petitioner's statement of the case demonstrates no jurisdictional issues, arbitration issues or issues relating to a grant of particular relief were presented to the Eighth Circuit in compliance with Rule 15(g).

Respondents' first formal pleading before the I.C.C. was filed January 3, 1983.[14] Since that first pleading, Respondents have consistently requested the exact relief ordered by the Eighth Circuit. Petitioner never raised the jurisdiction or arbitration issues before the I.C.C. nor before the Eighth Circuit. Petitioner's first request (or demand) for arbitration is contained in its Petition for Writ of Certiorari.

This Court has consistently held that matters not raised and preserved are waived and cannot be presented for the first time before it. As stated in *State of Tennessee v. Dunlap*, 426 U.S. 312, 316 n.3 (1976):

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14. *See*, Brief for Petitioner, Appendix at 16a.

> "This assertion was not pleaded in respondent's complaint, was not considered by the District Court or the Court of Appeals, and accordingly, is not before us."

Furthermore, this Court stated in *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967):

> "This matter was not raised in the Court of Appeals or in the petition for a writ of certiorari, even though the relevant portions of the transcript were made a part of the record on appeal. Under these circumstances, we see no cause for deviating from our normal policy of not considering issues which have not been presented to the Court of Appeals and which are not properly presented for review here."

Respondents submit the questions which were not previously presented should not be considered at this late stage of the proceeding and the Petition for Writ of Certiorari on those issues should therefore be denied.

D. There Is No Conflict Among the Circuit Courts of Appeal on the Issues Presented.

One of the most basic reasons for a review by this Court is a conflict of law between the circuits. In this instance no such conflict exists. While this Court and the Fifth Circuit affirmed the I.C.C.'s approval of the merger of BN and Frisco railroads in *Missouri-Kansas-Texas Railroad v. United States*, 632 F.2d 392 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981), the issues determined by the Eighth Circuit in this case were not addressed. The only other appellate decision cited by the Petitioner involving 49 U.S.C. Section 11347 or its predecessor, 49 U.S.C. Section 5(2)(f) is *Pennsylvania Railroad—Merger—New York Central Railroad*, 327 I.C.C. 475 (1966), *aff'd sub nom. Penn-Central Merger & N & W Inclusion*

Cases, 389 U.S. 486 (1968). While Petitioner tacitly admits that that appellate decision did not involve the issues herein, it draws the Court's attention to the apparent fact that one or more motor carrier subsidiaries were involved in the merger and states "yet it was never even suggested that employees of any of the motor carrier subsidiaries should receive protection pursuant to Section 5(2)(f)."[15] Surely the fact that no one suggested motor carrier subsidiary employees should receive protection in that proceeding does not mean that there is a conflict among the circuits on this issue.

Petitioner cites a number of decisions which involve the sale, acquisition or merger in trucking company transactions where railroads were not involved. Those transactions were not subject to the statutory provisions of 49 U.S.C. Section 11347 because railroads were not involved and, therefore, those decisions are not in conflict with the holding of the Eighth Circuit herein.

E. The Decision of the Eighth Circuit Was Fair and Correct.

The Eighth Circuit and the Petitioner have both cited *New York Dock Railway v. U.S.*, 609 F.2d 83 (2nd Cir. 1979) in their respective order and pleadings. That case recognizes that consolidations or mergers of carriers subject to the jurisdiction of the Interstate Commerce Act could have a devastating effect on the employees of those carriers and that employee protective conditions should be tailored to the special circumstances present in individual cases. *Id.* at 86, 92. Judges Heaney, Fagg and Collinson correctly noted the undisputed facts that following the merger, BN had two motor carrier subsidiaries

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15. Brief for Petitioner at 10.

operating under auxiliary-to-rail restrictions; that Petitioner chose to expand the certificated authority of one of its motor carrier subsidiaries at the expense of the other; that the remaining motor carrier subsidiary was still burdened by the traditional rail related restrictions; and that BN phased out FTC to make room for its other motor carrier subsidiary. The Eighth Circuit further correctly noted that the I.C.C. has long considered that a carrier and its subsidaries constitute a single transportation system with respect to transactions under Section 5 of the Act (mergers, acquisitions and sales), citing *Pennsylvania Railroad Company—Merger—New York Central Railroad*, 347 I.C.C. 536, 546 (1974). Therein, at page 547, the I.C.C. stated that the parent "has the legal right to direct the affairs of the subsidiaries and the latter have no alternative but to accept this direction, even if such were to result * * * in complete abandonment of the subsidiaries' operations or the extension of their corporate existence."[16] The Eighth Circuit viewed 49 U.S.C. Section 11347 and noted that the Congressional amendment referring to "employees who are affected by the transaction" instead of the language in former 49 U.S.C. Section 5(2)(f) which read "railroad employees affected" would seem to cover all employees of the merging companies, whether they were technical railroad employees, motor carrier employees of a subsidiary or non-carrier employees of a subsidiary.

The Eighth Circuit reasoned that it did not have to make that interpretation because the particular circumstances of this case, based on undisputed facts, indicated that Respondents are "railroad employees" within the meaning of the Act. The Eighth Circuit realized the I.C.C.'s interpretation should be given great weight but

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16. Brief for Petitioner, Appendix at 4a.

determined that the I.C.C. was clearly wrong. It noted that none of the cases cited by the I.C.C. involved motor carrier subsidiaries which exclusively operated auxiliary-to-rail services. The same cases are cited by Petitioner herein and the same reasoning applies. The determination of the Eighth Circuit was entirely correct and proper.

The Eighth Circuit further went into great detail concerning the promises and representations made by the various officials of Petitioner and Frisco, both to the I.C.C. and to their employees. Judges Heaney, Fagg and Collinson correctly noted those representations included promises that only a few employees of either company would be adversely affected by the merger and that those who were affected would be protected by standard employee protective conditions. Particularly, specific assurances were given that there would be no change in the operation or services to be provided by FTC. As previously stated, the specific representations considered by the Eighth Circuit from the I.C.C. record will not be reiterated herein but reference is drawn to Petitioner's Appendix at 8a through 13a.[17]

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17. While not determinative of the issues presented to this Court, Respondents feel compelled to reply to Footnote 36 found on page 21 of the Petition. Therein, Petitioner attempts to asperse the Eighth Circuit for referring to "isolated excerpts from the 8,000-page merger record". Petitioner was the principal party in the original I.C.C. merger proceeding and Respondents were not parties. The Eighth Circuit and the I.C.C. permitted all parties, including Petitioner, to request any portion of the voluminous record which they thought pertinent to the issues pending before the Eighth Circuit. Respondents requested all portions of the record involving the interests of the employees of which they were aware. Petitioner requested no portion of the record. Prior to the filing of this Petition, Petitioner has never suggested the representations made to the I.C.C. and to the Respondents did not, in fact, occur. It is manifestly unfair of the Petitioner to now complain that the Eighth Circuit reviewed only isolated portions of the 8,000-page merger record.

The Eighth Circuit fully understood the Congressional intent to provide a fair and equitable arrangement for the employees, and it considered the representations made to the I.C.C. and to the employees in reaching its decision. The Eighth Circuit was entirely correct in determining the legal issues in favor of the Respondent and remanding the proceeding to the I.C.C. for a computation of benefits. This ruling by the Eighth Circuit is fair and correct and does not warrant review by this Court.

F. The Court of Appeals Has the Jurisdiction and Authority to Issue the Order in This Case.

Petitioner argues the Eighth Circuit exceeded its jurisdiction by its failure to defer the issue to the I.C.C. Both the Eighth Circuit and Respondents recognize the general rule of law that an administrative agency should be given broad discretion in administering its area of expertise. If the administrative agency gave the final word in all instances, there would never be an administrative appeal. Congress specifically authorized the Court of Appeals to have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part) or to determine the validity" of all final orders of the I.C.C.[18]

The relationship of the courts and the administrative agency is not one of an adversarial relationship. "The conjunction of supervision and restraint yields a collaborative partnership between agency and court in furtherance of Congressional purpose and the interests of justice. . . . The court is in a real sense part of the total administrative process, and not a hostile stranger" to the agency.[19]

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18. 28 U.S.C. Section 2342.

19. *Greater Boston Television Corporation v. FCC*, 463 F.2d 268, 281 (D.C. Cir. 1971).

Petitioner claims that the Eighth Circuit erred by constructing a level of benefits for the Respondents which should have been left to the discretion of the I.C.C. The I.C.C. had previously structured the benefits pursuant to its 1980 Merger Order for the railroad employees of the merged system and subsidiaries pursuant to the *New York Dock* conditions.[20] The Eighth Circuit simply determined as a matter of law that under the specific circumstances of this case of first impression, the Respondents were railroad employees entitled to that level of protection. Consequently, the level of protection was structured by the I.C.C., not the Eighth Circuit.

It is the function of the courts to be the final determiner of legal issues and as this Court stated in *Neely, supra,* at page 330:

> "Petitioner's case in this court is pitched on the total lack of power in the Court of Appeals to direct entry of judgment for respondent. We have rejected that argument and, therefore, affirm."

The Eighth Circuit was totally within its authority to reverse the I.C.C. and remand for the computation of benefits. This argument on behalf of Petitioner does not warrant a grant of the Writ of Certiorari.

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20. *New York Dock Railway—Control—Brooklyn Eastern District Terminal,* 360 I.C.C. 60 (1979).

CONCLUSION

For the reasons herein stated, Respondents respectfully request the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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